SUPREME COURT, U. S.

Supreme Court of the United States

October Term, 1970.

No. 452

S. E. NICHOLS-DOVER, Inc., *et al.*,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Reply Memorandum of Petitioners to Memorandum for the National Labor Relations Board in Opposition.

James L. Burke,
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315 Lake Street,
Elmira, N. Y. 14901

The Reporter Company, Inc., Walton, N. Y. 13856—607 865-4131—1970

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Petitioner opposes the Solicitor General's request for dismissal on two counts:

First—The petition by its nature must be an appeal from the final action of the Circuit Court relating to the merits. This action was issuing a judgment May 15, 1970, which judgment could have amended the judgment of April 23, 1970.

Second—The petition was timely filed per entry as of April 23, 1970. The petition was mailed with accompanying letter and a copy mailed to the Solicitor General, Monday, July 20, 1970, at the Main Post Office, Elmira, New York. Petitioner received acknowledgment from the Solicitor General that he had received the petition, which acknowledgment was dated July 22, 1970.

The Clerk of the Supreme Court received petitioner's accompanying letter July 22, 1970. The package containing the balance of petitions was not entered until July 24, 1970, because of unforeseeable acts in transit, not the fault of petitioner, but excusable under all circumstances.

The facts are, a letter stating the petitions and Circuit Court record were mailed by separate cover was directed to the Clerk of the Supreme Court, a letter containing a copy of the petition directed to the Solicitor General, and two packages, one containing forty petitions and the other the record of the Third Circuit, were mailed, midafternoon, July 20, 1970, at the Main Post Office, Elmira, New York, first class, with proper postage for first class, identified as first class. Annexed as Exhibit A is a copy of the letter from the Solicitor General, dated July 22, acknowledging receipt of the petition. The Clerk of the Supreme Court received the covering letter July 22, but did not receive the packages of petitions and the court record until July 24.

The Postmaster at Elmira, New York, was asked to investigate. He reported to this counsel that a package mailed midafternoon first class from Elmira, New York, would normally be delivered at Washington the next day, July 21, that it was his opinion a post office employee had made an error, one that has occurred several times before, the error being upon seeing a large package the employee did not investigate, but assumed they were third-class mail and threw them in the third-class mail shipping crates. He said it would take one to two days longer to deliver third class than first class from Elmira to Washington.

Under these circumstances it would appear neglect upon the part of the Post Office Department was the cause of late filing as effectively as if the packages were lost in transit.

Additional petitions, under the new rule, were promptly sent to the Solicitor General.

Petitioner pleads that in all justice the Solicitor General having received the petition within the time, and the court having received the covering letter on time, with the packages delayed because of excusable inadvertence, the petition should be deemed timely filed.

Respectfully submitted.

JAMES L. BURKE,
Attorney for Petitioners,
315 Lake Street,
Elmira, N. Y. 14901

Exhibit A.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970.

S. E. NICHOLS-DOVER, Inc., SPENCER SHOE CORP., and IMAC FOOD SYSTEMS, Inc.,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 452

Service of One copy of Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit is acknowledged this 22nd day of July, 1970.

ERWIN N. GRISWOLD
Solicitor General